No. 97-29

In the Supreme Court of the United States

OCTOBER TERM, 1996

STATE OF TEXAS, APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

WALTER DELLINGER
Acting Solicitor General
ISABELLE KATZ PINZLER
Acting Assistant Attorney General
MARK L. GROSS
MIRIAM R. EISENSTEIN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the district court correctly concluded that Texas' request for a declaratory judgment to the effect that the appointment by the State Commissioner of Education of a master or management team for a local school district does not require preclearance under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, is not ripe for review.

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Pursuant to Rule 18.6 of the Rules of this Court, the Acting Solicitor General, on behalf of the United States, respectfully moves that the judgment of the district court be affirmed.

OPINIONS BELOW

The opinion and judgment of the district court (J.S. App. 1a-10a, 11a-12a) are unreported, as are that court's amended opinion and judgment (J.S. App. 13a-23a, 24a-25a).

JURISDICTION

The judgment of the district court was entered on March 5, 1997. A notice of appeal was filed on April 23, 1997. J.S. App. 26a-27a. The jurisdictional statement

was filed in this Court on June 23, 1997. This Court's jurisdiction is invoked under 28 U.S.C. 1253.

STATEMENT

1. Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, provides in pertinent part that, whenever a covered jurisdiction "enact[s] or seek[s] to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or [in] effect" on the date of coverage, the jurisdiction must obtain "preclearance" of the new practice—either by obtaining a determination from the United States District Court for the District of Columbia that the new practice does not discriminate in purpose or effect on the basis of race, or by submitting the new practice to the Attorney General and receiving no objection to the new practice from the Attorney General. See *Clark* v. *Roemer*, 500 U.S. 646, 648-649 (1991). Section 5 of the Voting Rights Act has been held to cover changes "affecting the creation or abolition of an elective office." *Presley* v. *Etowah County Comm'n*, 502 U.S. 491, 503 (1992); see *Allen* v. *State Board of Elections*, 393 U.S. 544, 550-551 (1969) (change from election of officials to appointment).

2. Texas is a covered jurisdiction under Section 5. See 28 C.F.R. Pt. 51 App. (1996). School districts in Texas are generally governed by boards of trustees elected by the voters of the district. See Tex. Educ. Code Ann. §§ 11.051-11.063 (West 1996); J.S. 3. In 1995, the Texas legislature enacted provisions in Chapter 39 of the Texas Education Code to promote accountability in the Texas public school system through intervention in local school districts by the State Commissioner of Education (Commissioner). Under

those provisions, the Commissioner may impose sanctions on local school districts in a variety of circumstances, including lowered accreditation ratings, violations of federal law or regulations, or failure to follow prescribed accounting practices. Tex. Educ. Code Ann. § 39.131(a) (West 1996); J.S. App. 2a-3a, 95a.

The sanctions available to the Commissioner vary considerably in the extent to which they may supersede the governing authority of the elected local school boards. For example, six of the ten sanctions available to the Commissioner, including such matters as ordering the school district to prepare a student achievement improvement plan and arranging an on-site visit (Tex. Educ. Code Ann. § 39.131(a)(3) and (5) (West 1996)) do not fundamentally affect the authority of local school boards. By contrast, two sanctions potentially available to the Commissioner under Chapter 39—the appointment of a board of managers to exercise the duties of the school board, and the authority to revoke a home-rule school district charter (Tex. Educ. Code Ann. § 39.131(a)(9) and (10) (West 1996))—would involve the complete ouster of the local school authorities, and it is uncontested here that implementation of those sanctions would require preclearance under Section 5 of the Voting Rights Act.

This case involves two sanctions potentially available to the Commissioner as to which there is a dispute concerning their implications for voting. Under Chapter 39, the Commissioner may appoint a master to "oversee" a local school district's operations. Tex. Educ. Code Ann. § 39.131(a)(7) (West 1996). In addition, the Commissioner may appoint a management team to "direct" operations in a school district's

areas of unacceptable performance. Tex. Educ. Code Ann. § 39.131(a)(8) (West 1996).[1]

Texas maintained that the sanctions available under Section 39.131(a)(7) and (8) of the Education Code do not affect voting within the meaning of Section 5. Nonetheless, the State submitted the new legislation to the Attorney General for preclearance. J.S. App. 30a-34a. The Assistant Attorney General[2] concluded that, "insofar as [Chapter 39] authorizes the Texas Education Agency to do the following: appoint a master, management team, or board of managers that will exercise a school board's powers; annex one school district to another; and revoke the charter of a home-rule school district, it clearly contains voting changes." *Id.* at 36a-37a. While the Assistant Attorney General did not interpose objection to the

[1] Approximately one month before the State submitted the new legislation to the Attorney General for preclearance, a local three-judge district court, acting pursuant to Section 5, entered a preliminary injunction against the appointment, under the authority of an earlier statute, of a management team for the Somerset Independent School District. Neither the predecessor statute nor the appointment of the management team had ever been submitted for preclearance because the State contended that neither affected voting within the meaning of Section 5. The district court granted a preliminary injunction, concluding that the plaintiffs were likely to prevail on the merits of the issue of whether the appointment of a management team was a voting change requiring preclearance under Section 5. See *Casias* v. *Moses*, No. SA-95-CA-0221 (W.D. Tex. May 11, 1995). The old authorizing statute was repealed on May 30, 1995, and was replaced by the provisions of the Education Code now at issue. See *Casias* v. *Moses*, No. SA-95-CA-0221 (W.D. Tex. Jan. 16, 1996) (dismissing as moot).

[2] The Attorney General has delegated the authority to make determinations under Section 5 to the Assistant Attorney General for the Civil Rights Division. 28 C.F.R. 51.8.

voting changes in Chapter 39 that are "enabling in nature," *id.* at 37a, he stated that any actual "voting change made pursuant to Chapter 39—including but not limited to the replacement, *de facto* or otherwise, of an elected school board by an appointed master management team, or board of managers" must be precleared when implemented by the Commissioner. *Id.* at 37a-38a.

3. On June 7, 1996, Texas filed a complaint in the United States District Court for the District of Columbia, seeking a declaration that Section 5 of the Voting Rights Act does not require the State to obtain preclearance of specific implementations of the sanctions authorized by Section 39.131(a)(7) and (8) of the Education Code. The State contended that invocation of those sanctions could not constitute changes with respect to voting. Texas also contended that the sanction provisions do not require preclearance because they are consistent with federal education statutes that require school systems receiving federal financial assistance to have in place provisions for assessment and accountability.

The district court convened a three-judge panel, and on March 5, 1997, the three-judge panel granted the United States' motion to dismiss. J.S. App. 1a-10a. The court concluded that the issues presented are not ripe for judicial review. *Id.* at 2a.

The court first noted that this action "does not fall clearly" into any category of suit contemplated by Section 5. J.S. App. 4a. The suit does not request a determination by the court that the provisions of Chapter 39 are not discriminatory in purpose or effect. Nor is it an action brought by voters to block implementation of an unprecleared change. Rather, the court noted, Texas' lawsuit seeks "a blanket

determination that any action pursuant to the Commissioner's new authority under Chapter 39 would not be a change covered by section 5." *Ibid.* The court found the "statutory basis for jurisdiction over such an action" to be "unclear." *Ibid.* It further observed that "if a statutory basis for jurisdiction exists, however, it is unclear whether such an action would involve a 'case or controversy' sufficient to satisfy the requirement of Article III of the Constitution." *Id.* at 5a.

Without resolving whether Section 5 furnishes a statutory basis for a declaratory judgment action to determine only whether a change in state law requires preclearance under Section 5, the court found that this case is not ripe for adjudication, in both the constitutional and the prudential sense of ripeness. J.S. App. 5a. With respect to the Article III component of ripeness, the court held that the injuries alleged by Texas "are not sufficiently imminent to create a justiciable controversy." *Ibid.* The court noted that Texas' argument that the case is ripe "assumes that neither the Attorney General nor the courts will grant preclearance, or that [the] proceedings will not be handled expeditiously" if the Commissioner eventually sought to impose one of the pertinent sanctions on a local school board. *Id.* at 6a. "These assumptions," the court held, are "simply, too speculative to sustain a claim." *Ibid.*

Regarding the prudential aspect of ripeness, the court held that the issues presented fail to satisfy the test set forth in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148-149 (1967), for a ripe challenge to an agency's interpretation of a statute before enforcement by that agency. First, the court noted, this case does not concern purely legal questions. Rather, the

powers given by Chapter 39 to the Education Commissioner are "broad, discretionary, and will be delegated so as to respond to a host of different precipitating circumstances. Thus, the actual contours of [each appointment order] will be determinative of whether an elected board is displaced or its powers in any way [are] diminished." J.S. App. 7a (internal quotation marks and citation omitted). "The statute at issue in this case * * * gives such wide discretion and flexibility to the Commissioner that, absent an actual appointment, there is no way to determine whether an elected school board will be replaced or its powers diminished." *Id.* at 8a.

Applying the second prong of the *Abbott* test, the court also held that withholding judicial decision at this stage would not cause "undue hardship" to Texas. J.S. App. 9a. The court was "unwilling to assume that administrative or judicial preclearance will prove so unwieldly as to deny Texas a meaningful opportunity to expeditiously implement its statutory scheme." *Ibid.* The court also remarked that "Congress has made the decision that the protection of voting rights outweighs any other State concerns," and that "[i]t is Congress which has struck the balance in favor of preclearance to protect voting interest[s] over school district changes to improve the education process." *Ibid.*

ARGUMENT

Appellant asks this Court to decide whether a three-judge district court has jurisdiction over a declaratory judgment action brought by a State covered by Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, solely for a determination whether a possible change in the governance of a local school

district would require judicial or administrative preclearance under Section 5. See J.S. i. The district court correctly concluded, however, that appellant's request for a declaratory judgment is not ripe for judicial review. Because that ripeness ruling is clearly correct and does not raise any substantial question warranting this Court's plenary consideration, the judgment of the district court should be summarily affirmed.

1. Chapter 39 of the Texas Education Code empowers the Texas Commissioner of Education to impose a number of sanctions on school districts, in ascending order of severity and intrusiveness. The Commissioner may, for example, issue a public notice of a school district's deficiency, order the preparation of a student achievement improvement plan by a school district, appoint an agency monitor to "participate in" the activities of a school board, appoint (as pertinent here) a master to "oversee" the operations of a district or a management team to "direct" the operations of a district, or appoint a board of managers to "exercise the powers" of the school board. See Tex. Educ. Code Ann. § 39.131(a) (West 1996). The available powers afford the Commissioner wide discretion in choosing a sanction appropriate to the degree of deficiency in any particular school board, and the Commissioner plainly has the authority to use a less intrusive sanction (such as appointing a monitor) before deploying a more drastic one (such as appointing a master or management team). It is not certain that the Commissioner will ever find it necessary to appoint a master or management team for any school district. In the event that a school district's deficiencies justify intervention under

Chapter 39, the exercise of less intrusive powers by the Commissioner may resolve the problems.

Because the State may never find it necessary to appoint a master to oversee the operations of a school board or to appoint a management team to direct those operations, the State's request for a declaratory ruling that such an appointment would not implicate Section 5 is not ripe for review, in the constitutional sense. See *Renne* v. *Geary*, 501 U.S. 312, 320-323 (1991). In effect, Texas has asked for an advisory opinion that, *if* the Commissioner decided at some point to appoint a master or management team, that appointment would not require preclearance under Section 5. But Texas has given no indication that the Commissioner intends imminently to appoint a master or management team to any particular school district. There is "no factual record of an actual or imminent application of [state sanctions] sufficient to present the [Section 5] issues in clean-cut and concrete form." *Id.* at 321-322 (internal quotation marks omitted).

Furthermore, the powers that the Commissioner may confer on masters and management teams under Section 39.131(a)(7) and (8) are subject to broad discretion on the part of the Commissioner. Those provisions allow appointment of a master to "oversee" the operations of a school district or a management team to "direct" such operations. While such appointments may well result in a change affecting voting if broad powers are conferred by the Commissioner, an appointment may also narrowly circumscribe the powers granted to the appointed officials. Thus, postponing consideration of the Section 5 issue "also has the advantage of permitting the state [authorities] further opportunity to construe" the pertinent

provisions of Chapter 39, giving greater clarity to the federal question of the application of Section 5 that would be presented by appointment of a master or management team. Cf. *Renne*, 501 U.S. at 323.

2. The district court also correctly concluded that prudential ripeness concerns counsel dismissal of appellant's declaratory judgment action. The prudential ripeness inquiry requires the courts to evaluate "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 149 (1967). Both factors point to the conclusion that the claim raised by Texas, that Section 5 does not require preclearance of certain sanctions imposed on local school boards by the Commissioner, is not ripe for judicial resolution at this time.

First, the issue presented in this case cannot be characterized as a "purely legal one." *Abbott Laboratories*, 387 U.S. at 149. Rather, the application of Section 5 is likely to turn on the exact nature of the sanction imposed by the Commissioner. Under settled law, the appointment of a receiver for, or manager over, a local elected body "affect[s]" voting and thus implicates Section 5 if the appointment amounts to a "*de facto* replacement of [the] elect[ed] offici[als] with an appointive one." See *Presley* v. *Etowah County Comm'n*, 502 U.S. 491, 508 1992); *Allen* v. *State Board of Elections*, 393 U.S. 544, 550-551 (1969) (companion case of *Bunton* v. *Patterson*). The answer to the question whether Section 5 applies to the appointment of a master or management team by the Commissioner is likely to depend on the precise scope of the powers given to the master or management team. Indeed, the Commissioner is directed in every case to "clearly define the powers and duties of a master or

management team appointed to oversee the operations of the district," Tex. Educ. Code Ann. § 39.131(e) (West 1996), which suggests that those powers may not be the same in every case. For example, the master or management team may have largely advisory authority in some cases but in others may be able to overrule broadly the decisions of the local school board. The absence of facts regarding the powers of the person or body to be appointed under subsection (7) or (8) makes it impossible for a court to decide in advance whether such an appointment would implicate the preclearance requirement of Section 5.[3]

Second, appellant will not suffer hardship if judicial resolution of the question of the applicability of Section 5 is postponed until the Commissioner actually seeks to use one of the pertinent powers authorized under Chapter 39. If the Commissioner finds it necessary to appoint a master or management team for a school district, then, once the Commissioner has

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[3] Section 5 itself reflects a concern for ripeness. Section 5 applies when a jurisdiction either "enacts" or "seek[s] to administer" a voting change. When an authorizing statute vests discretion in a state official, the Attorney General may be able to preclear the "enact[ment]," but she cannot predict how the official having discretion will "seek to administer" that enactment. Section 5 does not authorize the Attorney General (or the district court) to give a jurisdiction *carte blanche* by assuming that specific actions that might be taken in the future pursuant to an authorizing statute, but which are not yet identified or described, will *not* affect voting, or will not have either discriminatory purpose or retrogressive effect. Cf. *NAACP* v. *Hampton County Election Comm'n*, 470 U.S. 166, 178 (1985) (separate preclearance required for change in qualifying period for an election though general underlying statute already precleared); *Clark* v. *Roemer*, 500 U.S. 646, 658 (1991) (changes to be precleared must be identified with specificity).

clearly defined the powers of that person or body—as required by Section 39.131(e)—the State can present the appointment plan to the Department of Justice for preclearance with a request for expedited consideration. And if the Department of Justice refuses preclearance on the grounds that the appointment effects a change with respect to voting and has a retrogressive effect, the State will be able to request a declaratory judgment from the District Court for the District of Columbia in a concrete factual context.[4]

3. Finally, the district court correctly declined to address appellant's argument that the sanctions in question need not be precleared because they are consistent with federal law requiring recipients of federal financial assistance to have in place methods to impose sanctions on recipient school districts that

[4] As the district court noted in this case (J.S. App. 4a), it is not clear that Section 5 provides jurisdiction over a declaratory judgment suit brought by a covered jurisdiction *solely* to determine whether a change in the law affects voting, such that Section 5 applies. It is clear, however, that in other contexts a three-judge district court has authority to make the determination whether Section 5 applies. The issue of the applicability of Section 5 has been resolved in cases in which the covered jurisdiction has sought a declaratory judgment that the new practice does not have a discriminatory purpose or effect, see *Texas* v. *United States*, 866 F. Supp. 20 (D.D.C. 1994), or when the United States or an individual has sued to enjoin enforcement of a new voting practice because it has not been precleared, see *Presley*, *supra*. Those avenues of review either are expressly authorized by the Voting Rights Act itself or have been judicially found to be implied by the Act as necessary to promote its purposes. See 42 U.S.C. 1973c (authorizing preclearance suits by covered jurisdictions); 42 U.S.C. 1973j(d) (civil actions by Attorney General); *Allen*, 393 U.S. at 553-557 (recognizing implied private right of action to challenge unprecleared changes).

fail to show improved performance, and providing those recipients with flexibility in choosing their sanctions. See J.S. 17-21. That argument goes to the merits of the coverage of Section 5, but a ripe controversy is necessary for the courts to resolve that question, and appellant's request for a declaratory judgment is not ripe, for the reasons we have explained. The Texas Education Commissioner has demonstrated no concrete plan to appoint a master or management team for any particular school district.

Appellant's reliance on those federal statutes is ultimately unavailing on the merits anyway. The state statutes here at issue—as well as any specific use of the sanctions they authorize—represent the State's policy choice of the means of implementing the federal program. Changes in state law enacted to conform to federal requirements are not exempt from preclearance under Section 5 as long as those changes reflect to any degree the policy choice of the State. See *Young* v. *Fordice*, 117 S. Ct. 1228, 1235-1236 (1997); *Allen*, 393 U.S. at 565 n.29, 566-569.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
ISABELLE KATZ PINZLER
Acting Assistant Attorney General
MARK L. GROSS
MIRIAM R. EISENSTEIN
Attorneys

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